No. 14928

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

BRIEF OF APPELLEES.

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p. 29 - At end of first full paragraph, add:
This Court disagreed.

p. 35 - Note 17, third line: "[R.....]"
should be "[R.64,67-69]"

p. 36 Note 19, second line, third word:
"Not" should be "Note"

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BRIEF OF APPELLEES.

Preliminary Statement.

The judgment in this cause rests upon a finding of fact that the appellants' television play "Auto Light" was copied by them "in substantial part from the motion picture photoplay 'Gas Light' . . ." and that the "part so copied was and is a substantial part of said [television] play and of the copyrightable and copyrighted material in said motion picture photoplay." [Finding XII, R. 84.] Such a finding should inevitably compel the conclusion of copyright infringement. [*Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. 2d 354, 360-361; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F. 2d 49, 55-56.] That was, of course, the conclusion reached below.

Appellants seek to avoid that conclusion by an elaborate argument to the effect that parody or burlesque is a separate art form, socially valuable and of ancient lineage. So are many other forms of literary or artistic expression —*e.g.,* the drama or the novel. Yet, admittedly and necessarily, the serious dramatist or novelist who, in substantial part, copied his play or novel from the copyrightable and copyrighted material in appellees' photoplay would be an infringer, not a fair user. Why should the parodist, and only the parodist, stand in any better or different position before the law? Certainly this Court has not recognized the notion that "wholesale copying and publication of copyrighted material can ever be fair use . . ." [*Leon v. Pacific Tel. & Tel. Co.,* 9 Cir., 91 F. 2d 484, 486.]

The Copyright Act does not distinguish between classes of infringers. Nor does it limit the exclusivity of the copyright by the form in which the pirated material is reproduced. To the contrary, the history of copyright is one of gradual extension of the rights of the copyright owner. He was not always protected by statute against appropriation of his material for many profitable uses to which it could be put. As that fact came to be appreciated the statutory protection has been appropriately enlarged.[1]

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[1]Until appropriate statutory additions took care of the situation a novelist, for instance, could not prevent, nor had he any redress for, an unauthorized dramatization of his work. So, too, a dramatist had no ground of complaint in law for the transformation of his play into a novel. An author could not preclude others from publishing abridgments or foreign language translations. [*Coleman v. Walthen,* 5 T.R. (Eng.) 245; *Story v. Holcombe,* C.C. Oh., 23 Fed. Cas. 171 (Case No. 13497); *Stowe v. Thomas,* C.C. Pa., 23 Fed. Cas. 201 (Case No. 13514).] All of these rights are now exclusively those of the copyright owner. [17 U. S. Code, sec. 1.]

The result of that process has been, in this country, a copyright act giving the copyright proprietor the exclusive right "to any lawful use of his property, whereby he may get a profit out of it . . ." [*King Features Syndicate v. Fleischer,* 2 Cir., 299 Fed. 533, 535-536; *Fleischer Studios v. Ralph A. Freundlich, Inc.,* 2 Cir., 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717; *Stein v. Rosenthal,* S. D. Cal., 103 F. S. 227, 231, *aff'd,* 9 Cir., 205 F. 2d 633.]

Adherence to this doctrine will not stop or even slightly impair the proper practice of the parodist's art. It will merely deny to him a preferred position over all other kinds of authors. It will require him, along with the others, to exist on his own creative abilities instead of on the appropriation of the copyrightable works of others. The public demesne—which includes some part of every copyrighted work, see, *Nichols v. Universal Pictures Co.,* 2 Cir., 45 F. 2d 119, 121, 122, *cert. den.* 282 U. S. 902—has been heretofore thought sufficient, in conjunction with the limited term of copyright, to assure the progress of science and the useful arts. Why should the parodist, and only the parodist, have a larger and greener field in which to roam at will?

Parody, properly so-called, is just as often, if not more frequently, a lampoon of schools of thought or of social, political or economic attitudes and philosophies, or of the general and characteristic conceptions and style of some author or school of authors, as it is of the specific material or a particular work of a given author. So long as the parodist of copyrighted works sticks to that which all are free to use—ideas, general plots, abstract conceptions and the like—he has ample material for his purpose. It is only when he takes that which is, for the time being,

the exclusive property of another that the decision below operates to restrict his asserted freedom of appropriation.

We have never denied and do not now deny, that anyone—parodist as well as serious writer—may take from "Gas Light" its abstract ideas and outline, its theme and the like, and construct thereon his own treatment of the subject. We do deny that anyone—parodist or serious writer—may take from that work for his own profit the *appellee's* treatment of the subject by taking its details, incidents and sequence of events.

Of course, parody and burlesque may be socially valuable forms of literary and dramatic expression. But they are certainly of no greater value than serious literature or drama. If the creators of the latter are limited in what they may lift from prior works, why should the parodist not be? What reason of policy or social utility is there for putting only the parodist in so greatly preferred a position over other authors generally? A decision in appellee's favor in this case will not put a stop to proper parody or burlesque. But it will have the salutary effect of notifying practitioners of that art that, to the same extent as other authors, but only to that extent, they must live by their own work rather than by the theft of someone else's.

Jurisdiction.

1. This being a case for infringement of a copyright it arises under the Copyright Laws of the United States. [R. 3.] The District Court's jurisdiction was properly invoked under 28 U. S. Code, sec. 1338(a).

2. Jurisdiction of the Court of Appeals arises under 28 U. S. Code, sec. 1291, the District Court having rendered a final decision in a case within its original jurisdiction. [R. 88.]

Statement of the Case.

Appellants' statement needs some supplementation to bring out the entire context of fact in which this case was decided.

Prior to December 5, 1938 appellee Patrick Hamilton created and wrote an original dramatic composition entitled "Gas Light." The play was first publicly performed in England where it was protected by the British Copyright Act of 1911. It was duly registered for copyright in the United States as a foreign work on November 18, 1941. [R. 49-52.] The world motion picture rights in the play were sold to appellee Loew's Inc. in 1942 for $150,000.00. [R. 52-53.]

Loew's produced and copyrighted a motion picture photoplay based on the Hamilton play. A total of $126,-691.28 was expended in connection with the writing of the screen play for the motion picture. The total production cost was $2,458,275.18.[2] [R. 53-55.] The photoplay was quite successful, playing to audiences of about 24,000,000 in this country and another 27,786,000 in foreign lands. It is still in release and distribution in foreign countries, but not in America. [R. 55-56.] It is a customary and usual practice to reissue a motion picture five years or more after its initial release. "Gas Light" has not yet been reissued. [R. 56.]

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[2]These cost figures give some idea of the vast and expensive effort which goes into the production of a motion picture of the caliber of "Gas Light." They also indicate how much of a bonanza it would be to television—which, after all, is a strong and vigorous competitor of motion pictures in vying for the time and patronage of entertainment audiences—to be able to appropriate without cost or effort the expensive dramatic material acquired, created and adapted by motion picture producers for their own product.

Appellants and their writers had ample access to appellees' photoplay. They had a copy of the screenplay, obtained without Loew's notice or consent. They viewed the photoplay as well as the stage play on which it was based. They also had a copy of the stage play. [R. 62-63, 69-70.] Comparison of the infringing television play [Exs. 8, 10] with the motion picture [Exs. 2, 3] leaves no room for doubt that the former was copied from the latter.[3] If the material taken by appellants from "Gas Light" is eliminated there is left only a few pointless "gags" and some incoherent and disconnected dialogue, telling no discernible story. [Appendix A, *infra.*] On the other hand, if the material which did not come from the photoplay is taken out of the television play, what is left is the photoplay—its plot, story, principal incidents, and virtually identical sequence of events. [Appendix B, *infra.*]

Notice was given appellants of the exclusive rights claimed by Loew's, well in advance of the infringement now complained of. This action followed promptly upon the discovery by Loew's that appellants intended to repeat a prior infringement of the photoplay copyright. [R. 65-68.]

Summary of the Argument.

The District Court's finding of fact, that appellees copied and inserted in their filmed television play substantial parts of appellee's copyrighted motion picture

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[3]The appendices to this brief consist of: A: The television play [Ex. 10] with the material taken from the photoplay deleted. B: The television play with the new material inserted by appellants deleted. Summaries of the infringed and infringing works and an analysis of the pronounced similarities between them will be found in the record. [R. 17-22.]

photoplay, is supported by substantial evidence. The copying is virtually admitted. The substantiality of the parts pirated is established by their importance in both the infringed and infringing works. Without those parts neither work would tell any recognizable story or be anything more than a few unrelated and incoherent incidents.

The fact that appellants were purporting to parody or burlesque the photoplay does not establish any defense of fair use. Wholesale copying of copyrighted material is not fair use. Even if it could be, the defense would not be available here because the copying has pre-empted the market and to a considerable extent satisfied the public demand for a comic or burlesque version of appellee's photoplay; and because it has enabled and will enable appellants to compete with appellee's motion pictures for the attention and patronage of the entertainment seeking public.

The exclusive right to reproduce the copyrighted work in any form, conferred by the Copyright Act, cannot be limited or impaired by an alleged custom to parody or burlesque such works. Custom cannot vary or alter a statute. Were the rule otherwise, the evidence here is insufficient to bring about any such effect upon the Copyright Act since it does not show either the universality of the custom or the fact that it has been practiced in a way which, but for the custom, would have been an infringement.

To permit the defense of fair use in the breadth which appellants demand would give to the parodist a preferred position over all other authors. He, and he alone, would be entitled with impunity to practice his art by the bald appropriation of the substantial and protected material of other authors. No sound policy or reason exists for the creation of such a discriminatory rule.

ARGUMENT.

I.

The Finding of Substantial Copying Is Supported by Substantial Evidence and Compels the Conclusion of Copyright Infringement. That Is True Regardless of the Form or Mode in Which the Pirated Material Is Used by the Infringer.

Appellants specify the findings of substantial copying as erroneous. [App. Op. Br. 6.] The fact is that they are supported by substantial evidence and, therefore, are not clearly or at all erroneous. [F. R. C. P., rule 52(a); *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 378; *Lincoln Nat. L. Ins. Co. v. Mathisen,* 9 Cir., 150 F. 2d 292, 296.]

First: That there was *copying* appellants do not deny. In effect they baldly admit copying when they say that their writers "necessarily had to use the recognizable elements of 'Gas Light' . . ." [App. Op. Br. p. 9.] Even if that were not so, a denial of copying could not survive comparison of the two works. Appellants have taken from the photoplay, not alone the general theme or idea, but the major sequences and details by which that idea is developed and the story told and upon which all else in the picture depends.

The motion picture tells of a man who sets out upon a deliberate plan to drive his wife insane. He is motivated in this endeavor by the need of having access to a house owned by his wife, in which, for the sake of some valuable jewels he intended to steal, he had committed a murder. His method of achieving his end is to induce in his wife the belief that she is having hallucinations and suffering serious lapses of memory. He does this by causing the

dimming of the gaslights in the home at night and the making of strange sounds, at times when presumably there was no one else else in the house to account for them; and by abstracting articles trusted to his wife and by removing a portrait from the walls, making her believe that she was responsible but had forgotten. He fosters that belief, in part, by causing the servants to bear witness that they did not remove the portrait. The suspense aroused by the picture—and its whole point—is whether he will succeed in his scheme. He does not, because of the intervention of a Scotland Yard detective who has become, first interested in, and then obviously enamoured of, the heroine. The detective apprehends the husband at the climax of his plot, ties him to a chair and then reveals the truth to the wife. At her request she is given an opportunity to talk to the malefactor who attempts once again, through his personal charm, to subdue her to his will. She resists his blandishments. In this scene, the wife, at her husband's request, takes a knife which he has kept nearby. Suspense is heightened here by the question whether the wife will use the knife to cut the husband's bonds or to kill him. She does neither but contents herself with denouncing him.

The appellants' play, in considerably compressed form, tells substantially that story. To be sure, it is played for farce or broad comedy rather than serious drama or melodrama, but it is nevertheless the same story. What was used by appellants was not alone the general or abstract conception of a husband who seeks to drive his wife insane by causing her to believe that she suffers from hallucinations and loss of memory and who is prevented from accomplishing that purpose by some extraneous intervention. It is that conception, developed and expressed in the same way, by the same incidents and sequence of

events, and with the same motivation, that has been appropriated.

Second: The parts so taken were *substantial.* Whether in any case a taking has been substantial is determined qualitatively rather than quantitatively. The criterion is not amount, but literary or dramatic value in the context of the copyrighted work. The controlling rule in this regard was laid down almost with the beginning of copyright law in this country in *Folsom v. Marsh,* C. C. Mass., 9 Fed. Cas. 342, 348 (Case No. 4901) and *Story v. Holcombe, supra,* 23 Fed. Cas. at 173, when it was said, quoting from the latter, that infringement "does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages they take from it that in which its chief value consists. . . ."

Concrete instances of the application of this rule are not few in number. An example from this Circuit is *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 360, in which a taking of one sequence, comprising in length about 20% of the copyrighted motion picture, was held to be substantial because it was "intimately tied into the story, and [was] a main source of comedy for the picture as a whole. . . ." [See, also, *Warner Bros. Pictures v. Columbia Broadcasting System,* 9 Cir., 216 F. 2d 945, 950.] Similarly, in *De Acosta v. Brown,* 2 Cir., 146 F. 2d 408, 410, a fictional love interest interpolated into an otherwise factual story of Clara Barton intended for screen use, even though it was only a small part of the copyrighted work, was held to be sufficiently substantial to make its appropriation infringement, because it was an important element in stories designed for the motion picture public. Again, in *Henry*

Holt & Co. v. Liggett & Myers Tob. Co., E. D. Pa., 23 F. Supp. 302, 303, the quotation in a cigarette advertisement of only three sentences from a medical treatise was held to be a substantial taking, notwithstanding it was such a small part of the protected work. It was held substantial because it represented most of what was pertinent in the treatise to the subject of the ad; and because it formed a much larger part of that ad. [To the same general effect, see: *Toksvig v. Bruce Pub. Co.,* 7 Cir., 181 F. 2d 664, 667; *Harms v. Cohen,* E. D. Pa., 279 Fed. 276, 278; *Johns & Johns P. Co. v. Paull etc. Corp.,* 8 Cir., 102 F. 2d 282, 283; *Warren v. White etc. Mfg. Co.,* S. D. N. Y., 39 F. 2d 922, 923.]

Of course, it follows from cases such as those cited above that it is not necessary to a finding of infringement that all or even the greater part of the plaintiff's work shall have been taken. It is enough that a qualitatively substantial part has been copied. [In addition to the cases already cited, see: *M. Whitmark & Sons v. Pastime Amuse. Co.,* E. D. So. Car., 298 Fed. 470, 476; *Towle v. Ross,* D. C. Ore., 32 F. Supp. 125, 127; *Reed v. Holliday,* W. D. Pa., 19 Fed. 325, 327.]

These principles make inescapable the conclusion that appellees' copyright was infringed by appellants. Were the copied material eliminated from the photoplay, appellees would have no story left. Eliminated from the television play the same result would follow. [Appendix A, *infra.*] By all of the tests prescribed in the decisions to which we have referred, the parts thus taken must be classed as protectible and substantial. Just as in *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 360, the one sequence copied was substantial because it was "intimately tied into the story, and [was] a main

source of comedy for the picture as a whole" so here the gaslight, picture, and apprehension sequences are substantial because they are so intimately tied into the story and are the main source of suspense and plot development for the picture as a whole. And, just as in *Folsom v. Marsh, supra,* 9 Fed. Cas. at 348-349, the part taken was substantial because without it the appropriator would have had no work left, so here the copied sequences are substantial because without them the defendants would have had no play.

Third: The defense of this appropriation seems to be that what was taken was presented as burlesque or parody and since the latter are separate "art forms" there has been a fair use. The legal fallacies in that defense will be dealt with shortly. [Point II, *infra.*] For the moment, it may be pointed out that the assertion that burlesque or parody is a separate form intensifies rather than palliates the infringement. Novels, dramas, translations and the like are themselves separate art forms at least to the same extent as burlesque or parody. Yet it would never occur to any one to argue that because of that fact a dramatist could with impunity dramatize a copyrighted novel, or that a novelist could novelize a copyrighted drama. The test of infringement must in every case be the substantiality of the material taken, not the *mode or form* in which the appropriations are used. The protection secured by the Copyright Act extends to all of "the various modes in which the matter of any publication may be adopted, imitated or transferred . . ." not just to imitation of the particular mode in which the

original work was presented. [*Nutt v. National Institute,* 2 Cir., 31 F. 2d 236, 238; *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d 361; *Falk v. Donaldson, supra,* 57 Fed. at 36-37.]

The whole purpose of the Copyright Act is to secure to an author, for a limited term, the *exclusive* right to reproduce and disseminate his work in every form and by every method of which it is capable. The very fact that burlesque or parody is a separate art form, if it is, demonstrates that by translation of a work into that form one of the important rights of the copyright owner has been appropriated; for it is then a form or mode into which he could himself have translated the work and in the exclusive right to which his copyright secured him.

Illustrative of this proposition is *Universal Pictures Co. v. Harold Lloyd Corp., supra,* 162 F. 2d at 374, in which it was held that one of the rights secured by copyright of a motion picture photoplay was the right to *remake it* ". . . in whole or in part . . . in any manner or by any method [by which it could] be exhibited, performed, represented, produced, or reproduced . . ." Also analogous is *King Features Syndicate v. Fleischer,* 2 Cir., 299 Fed. 533, 535-536, holding a copyright in a comic strip character infringed by its reproduction as a doll, and saying that the copyright proprietor "is entitled to any lawful use of his property, whereby he may get a profit out of it . . ." [To the same effect, *Fleischer Studios v. Ralph A. Freundlich, Inc.,* 2 Cir., 73 F. 2d 276, 278, *cert. den.* 294 U. S. 717.] So too, a copyright

of a piece of statutory is infringed by its reproduction and incorporation into a lamp, and this notwithstanding that utilitarian objects as such cannot be copyrighted. [*Stein v. Rosenthal, supra,* 103 F. Supp. at 231, *affirmed,* 205 F. 2d 633; *Stein v. Mazer,* 4 Cir., 204 F. 2d 472, 477-480, *affirmed, Mazer v. Stein,* 347 U. S. 201.] And quite appositely, in *Hill v. Whalen & Martell,* S. D. N. Y., 220 Fed. 359, 360, a *dramatization* of the copyrighted "Mutt and Jeff" cartoon characters was held an infringement notwithstanding the defense that the dramatic imitation "was a mere parody or burlesque of the original, and was so intended." [See, also, *National Comics v. Fawcett Publications,* 2 Cir., 191 F. 2d 594, 603, holding that a cartoon copyright could be infringed by a motion picture dramatization of the comic strip.]

It can be of no avail to the appellants, therefore, that their plays are burlesque whereas appellees' picture is serious drama. The right to transform that drama into burlesque, if so desired, was exclusively the copyright owner's, and it is immaterial that it may not yet have exercised that right. ". . . The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property . . ." [*Fox Film Corp. v. Doyal,* 286 U. S. 123, 127; *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d at 487.] By appropriating appellees' material the appellants have not only violated that right of exclusion, but they have to a considerable extent preempted whatever market there might be for a burlesqued or humorous version of "Gas Light," and thus have seriously impaired the additional right inhering in Loew's copyright to transfer its own material into any mode or form of which it is susceptible.

II.

The Doctrine of Fair Use Is Not Applicable.

A. Appropriation of Substantial Copyright Material Cannot Be Justified Because the Material Is Used as Parody or Burlesque.

The attempt to defend against copyright infringement by the claim that the infringing work was "merely a parody or burlesque" is not new. Such an attempt has been the subject of several decisions and has been disposed of, not by determining whether the alleged infringing use was parody or burlesque, but by ascertaining whether it amounted to a taking of substantial, copyrightable material. In other words, a parodized or burlesqued taking is treated no differently from any other appropriation.

The dividing line between permissible and nonpermissible parody is strikingly illustrated by two of the cases which are found immediately next to each other in the reports—*Green v. Minzenheimer,* C. C. N. Y., 177 Fed. 286, and *Green v. Luby, C.C. N. Y.,* 177 Fed. 287, 288. In the first of these cases, a parodied imitation of an actress' manner or style of singing a song, but in which no copyrighted material owned by the plaintiff was used, was held nonactionable. On the other hand, in the *Luby* case, where, in addition to mimicry or parody of the mannerisms of an actress who frequently sang it, a copyrighted song was sung, infringement was found. The Court said:

> "The next question is one of infringement. The defendant admits that she sings the copyrighted song

with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. 'The mannerisms of the artist impersonated,' to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should select for impersonation a singer singing something else than a copyrighted song.

"Bloom v. Nixon (C.C.) 125 Fed. 977, is distinguishable in that in that case the chorus only of the copyrighted song was sung. Green v. Minzenheimer (decided by this court March 19, 1909), 177 Fed. 286, is distinguishable in that in that case the defendant imitated the singer without musical accompaniment, and the testimony as to just what she did was not clear."

Bloom & Hamlin v. Nixon, C.C. Pa., 125 Fed. 977, 978-979, as the foregoing excerpt indicates, was a case in which no infringement was found because only a small part, *i. e.,* an unsubstantial amount, of copyrighted material was used, the principal part of defendant's performance being an imitation of the singing manner and stage business of an actress who had made the song popular and with those stylized rendition of it the words had be-

come inseparably connected.[4] Significantly, however, the Court pointed out that "if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly . . ."

Another parody case is *Hill v. Whalen & Martell, supra,* 220 Fed. 359, in which, as we have seen, a dramatization of a cartoon strip was held to infringe notwithstanding that it "was a mere parody or burlesque of the original, and was so intended."[5]

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[4]Obviously there is no such inseparable connection between the general theme or plot of "Gas Light" and the detailed incidents by which that theme was developed and expressed, as to require in a parody of the former a substantial use of the latter. Permissible parody could have been accomplished without taking the short-cut of appropriating plaintiff's copyrighted material.

[5]While not directly on the point, *M. Witmark & Sons v. Pastime Amuse. Co., supra,* 298 Fed. at 479, is helpful because of its restatement of the rule established by the *Bloom, Minzenheimer,* and *Luby* cases; and because of its rejection of the argument, attempted to be drawn from them, that the rendition of a song to accompany an exhibition of a motion picture "merely as a vehicle to 'put the picture across' . . ." was not an infringement of copyright in the song. In this latter connection the Court said:

> ". . . If such use were permitted, the thousands of moving picture shows throughout the country could use the very best portions of copyrighted songs for their own benefit, until the public were thoroughly tired of hearing them, and the owners would have little left of any value. I cannot think the Congress intended any such result."

B. Fair Use Is Based on Implied Consent and the Absence of Any Tendency to Supplant or Compete With the Appropriated Work. It Cannot Be Found Here Because the Requisite Consent Cannot Fairly Be Implied in View of the Invasion of Appellees' Right of Exclusion and the Direct Competition Between Television and Motion Pictures.

First: No right to make the infringing use here shown can be derived from the doctrine of fair use properly so-called.[6] When that doctrine is applicable its effect is to permit a limited, reasonable use of another's copyrighted material; but it is only applicable in those cases in which the use is of a sort for which the copyrighted publication was designed, from which fact consent to the making of such a use may be fairly implied. Thus, a scientific treatise is designed to be employed by those who are themselves engaged in teaching or working in the field. Accordingly, relatively small parts of it may be quoted or used by another writer in the same field, so long as the taking is not substantial, and the rights of the original author are not injuriously affected or the objects of his work superseded. [*Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. at 304; *Sampson & Murdock Co. v. Seaver-Radford Co.,* 1 Cir., 140 Fed. 539, 541; *Mathews Conveyor Co. v. Palmer-Bee Co., supra,*

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[6]Occasionally, the Courts have referred to the right to use the *non-copyrightable* material in a copyrighted work as "fair use." [*Sheldon v. Metro-Goldwyn Pictures Corp., supra,* 85 F. 2d at 54; *Towle v. Ross, supra,* 32 Fed. Supp. at 127; *Warner Bros. v. Columbia Broadcasting System,* S. D. Cal., 102 F. Supp. 141, 148-149.] In that meaning the question is only the conventional one in copyright cases, *i. e.,* was the appropriated material copyrightable. Primarily, however, the concept referred to as "fair use" relates to the extent to which *copyrightable* or protectible material may be used without express license.

135 F. 2d at 85; *Lawrence v. Dana, supra,* 15 Fed. Cas. at 60-63; *Macmillan Co. v. King,* D. C. Mass., 223 Fed. 862, 866; *Baker v. Selden,* 101 U. S. 99, 102-103.] Similarly, a dictionary may be appropriately quoted, because its very purpose is to supply its readers with usable definitions; but, of course, such quotation would not be permitted in a competing dictionary. [*Webb v. Powers,* C.C. Mass., 29 Fed. Cas. 511, 516-517 (case No. 17323). See, also: *American Institute of Architects v. Fenichel,* S. D. N. Y., 41 F. Supp. 146.]

In the case of literary or dramatic works, as distinguished from utilitarian compilations or learned treatises, about the only fair use which has been recognized is the privilege of making reasonable, illustrative quotations in a *bona fide* review or criticism [*Folsom v. Marsh, supra,* 9 Fed. Cas. at 344-345; *New York Tribune v. Otis & Co.,* S. D. N. Y., 39 F. Supp. 67, 68; *Hill v. Whalen & Martell, supra,* 220 Fed. at 360], or in a factual or historical study of one with whom a copyrighted work has become so associated as to make it a biographical or historical fact. [*Broadway Music Corp. v. F-R Pub. Corp.,* S. D. N. Y., 31 F. Supp. 817; *Karll v. Curtis Pub. Co.,* E. D. Wis., 39 F. Supp. 836, 837.] No use, however, is fair if as a result of it the second author has done little more than "to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit . . ." [*Conde Nast Publications v. Vogue School,* S. D. N. Y., 105 F. Supp. 325, 333; *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d at 486-487; *Toksvig v. Bruce Pub. Co., supra,* 181 F. 2d at 667; *Lawrence v. Dana, supra,* 15 Fed. Cas. at 62; *Simmons v. Stanton, supra,* 75 Fed. at 10; *Reed v. Holliday,* W. D. Pa., 19 Fed. 325, 327; *West Pub. Co. v. Edw. Thompson Co.,* E. D. N. Y., 169 Fed. 833, 843,

modified, 2 Cir., 179 Fed. 833, 838; *Marx v. United States,* 9 Cir., 96 F. 2d 204, 207.]

The general tenor of all of the decisions on the subject is shown by excerpts from two of them—*Henry Holt & Co. v. Liggett & Myers Tob. Co., supra,* 23 F. Supp. at 303-304, and *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d at 486-487. In the first of these it was said:

> "In order to constitute an infringement of the copyright of a book it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole . . .
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> "Nor do we think that the infringement complained of is excused upon the ground that the defendant was making no more than a fair use of Dr. Felderman's work. It is true that the law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. Sampson & Murdock Co. v. Seaver-Radford Co., 1 Cir., 140 F. 539. This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East. 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art."

And in the *Leon* case, from this Circuit, the following appears [italics ours]:

> "It is not necessary in the case before us to discuss generally the question of what constitutes 'fair

> use.' Obviously, every publication copyrighted admits of many uses which do not constitute infringement. Counsel have not disclosed a single authority, nor have we been able to find one, which lends any support to the proposition that *wholesale copying and publication of copyrighted material can ever be fair use . . .*"

Since the basis of the doctrine of fair use is implied consent it follows that it is never applicable in circumstances which would make it unfair or unreasonable to imply such consent. So, when the alleged fair use is in a work which may supplant or *compete* with the original, a substantial taking from the latter cannot be and is not permitted. That proposition necessarily derives from the frequently repeated statement in the decisions that an important criterion of fair use is the extent to which the second work may tend to supersede the objects of or diminish the profits from the original. In several of the cases, the importance of the competitive element has been specifically articulated, especially where, in finding fair use, the absence of competition was emphasized. [See, for example: *W. H. Anderson Co. v. Baldwin,* 6 Cir., 27 F. 2d 82, 89; *Karll v. Curtis Pub. Co., supra,* 39 F. Supp. at 837; *Sampson & Murdock Co. v. Seaver-Radford Co.,* 1 Cir., 140 Fed. 539, 541-542.]

On the other hand, the mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial. That principle has been well stated in this Circuit in *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d

at 486-487, as we have seen; while others to the same effect are: *Falk v. Donaldson, supra,* 57 Fed. at 36-37; *Reed v. Holliday, supra,* 19 Fed. at 327; *Warren v. White etc. Mfg. Co.,* S. D. N. Y., 39 F. 2d 922, 923; *Johns & Johns P. Co. v. Paull etc. Corp., supra,* 102 F. 2d at 283; *Harms v. Cohen,* E. D. Pa., 279 Fed. 276, 279; *Macmillan Co. v. King, supra,* 223 Fed. at 867-868.

Second: The foregoing decisions dispose of any claim of fair use at bar. Here, we do not have a case of an unsubstantial taking, but a substantial one and, therefore, a clear violation of plaintiff's right of exclusion. We have, in addition, a clear case of the saving of defendants' time, trouble and expense in accomplishing their own commercial purpose by the simple expedient of taking ready-made the results of plaintiff's extensive and costly labors. Obviously, it would have been a much more difficult and expensive job for them to have created an *original* and noninfringing parody of "Gas Light" had they been compelled to originate and write their own incidents and sequence of events instead of taking the plaintiff's material. To paraphrase only slightly some directly applicable language from *Toksvig v. Bruce Pub. Co., supra,* 181 F. 2d at 667, it is clear that the defendants obtained much value from the use in their work of many of the original concepts and ideas of plaintiff and were enabled to finish their plays in much less time. Such a use cannot be held fair and not an infringement.

Most importantly, however, the circumstances of the instant case prevent any implication of a consent to the use which has been made. It is common knowledge that television and motion pictures are directly competitive; and that the advent of the former has had a seriously detrimental effect upon the revenues of the latter. Many

people, who otherwise might be in a motion picture theater, now stay at home to view without cost such extremely popular and able performers as the appellant Benny.

It is the height, not only of unfairness, but of absurdity, we respectfully submit, to say that Loew's has impliedly consented to the free use of the photoplay, which it produced by extensive and expensive effort, in order that more people may be induced to stay home in preference to attending a movie. Yet, that is exactly what must be said if fair use is to be found. Television generally and the appellants specifically, of course, have the right to compete with the motion picture industry and with Loew's. But their competition for the patronage of the entertainment public must be fair and the product by which they compete must be their own, not the unauthorizedly appropriated property of those with whom they are competing.

C. The Authorities Upon Which Appellants Rely Do Not Support Their Position.

The authorities and decisions upon which appellants base their argument do not require any retreat from the principles which we have discussed. Most certainly they do not require any change from the analysis of fair use which this Court made in *Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486-487.

First: Strong reliance is placed by appellants on *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, a decision of Mr. Justice Younger, a British trial Judge, not reviewed on appeal. What was there said on the subject of parody was dictum, based on premises which have been rejected in this country as well as in England. The dictum itself has been criticized and repudiated.

The only point actually decided in the *Glyn* case was that the amount of *copyrightable* material taken from the plaintiff's work was of such a trifling nature as not to be substantial. The references to burlesque, therefore, were clearly *obiter*. All this appears from Younger, J.'s opinion. First, he summarizes the plaintiff's story and then comments as follows:

> "In all its essentials the so-called episode is as hackneyed and commonplace a story as could well be conceived. If it is to be distinguished at all from innumerable anticipations in erotic literature, the distinction is to be found in the accessories of the tale . . . At the best, the plaintiff has chosen a hackneyed theme for her episode, and her privilege as an authoress must be strictly confined to the method of treating it which she has adopted." ([1916] 1 Ch. at 266-267.)

He next synopsizes the allegedly infringing motion picture, emphasizing its striking and substantial difference in plot, incidents, details and treatment from the Glyn novel; and then comments in this vein:

> ". . . the incidents of the film to which even so remote a resemblance with any in the novel can be found are *exceedingly few in number or importance*. The great bulk of the film is taken up with happenings which have no counterpart in the novel; a great part of the novel is taken up with other incidents which have no counterpart in the film; on the whole . . . I have arrived at the *conclusion of fact* that the film does not constitute any infringement of the plaintiff's copyright in the novel." ([1916] 1 Ch. at 267-268. Italics ours.)

Finally, as showing that he himself recognized that what followed was *obiter dictum* and not a decision of

the point, the learned Justice introduced his discussion of burlesque with this sentence:

> "This view of the case makes it unnecessary that I should do more than refer in passing to the important point raised by the defendants that their film is a mere burlesque of the plaintiff's novel, and that a genuine burlesque of a serious work constitutes no infringement of copyright, although it may under certain conditions justify an action in the nature of slander of goods." ([1916] 1 Ch. at 268. Italics ours.)

The law of fair use in England is correctly reflected in the following quotation from the leading encyclopedia of British law—7 Halsbury's Laws of England (2d ed. 1932, edited by Lord Hailsham) 567, sec. 893:

> "Copyright is a proprietary right, and its infringement is actionable without proof of damage; if, therefore, a substantial part of an author's work is taken, it is not material to consider whether the user is fair or unfair, or whether the two publications are, or are not, likely to enter into competition with one another . . ."

To this statement is appended, as a footnote, the following illuminating comment on the *Glyn* case:

> ". . . Younger, J., in *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261 at p. 268 . . . suggested that a burlesque would not be an infringement of the copyright in a play on which it was based if the defendant had bestowed such mental labor upon what he had taken and had subjected it to such revision as to produce an original result . . . Younger, J.'s view (*supra*) was not the basis of his judgment. It would appear that at any rate since the commencement of the Copyright Act, 1911

(1 and 2 Geo. 5, c. 46), whereby reproduction in any material form was made an infringement of copyright there can be no justification for a user of copyright material based upon a supposed right to abridge or burlesque. A burlesque may, of course, be no infringement because it does not reproduce any of the incidents of the play burlesqued, but only the plot in which there is no copyright . . ."

Leading English copyright authorities agree. For example, in Copinger & Skone James, *Law of Copyright* (8th ed. 1948), pages 129, 131-132, it is said:

"It is thought that the question whether abridgments [etc.] infringe copyright must now depend upon the answer in each case to the question whether the production has involved a *substantial use of copyrighted material* or only of ideas and information . . .

* * * * * * * *

"Similar considerations seem to arise whether a burlesque can be an infringement. If the burlesque consists of what is, in substance, a new work parodying an existing one but not making substantial use of its language or incidents, it is submitted there is no infringement. But a work which slavishly used the plot and incidents of another *would not be defensible under the cloak of burlesque.*" (Italics ours.)

Similarly, in Clarke, *Copyright and Industrial Design* (1951), page 63, after citing *Carlton v. Mortimer,* McGillivray's Copyright Cases (1917-23) 194,[7] the comment is:

"The Court held that these two incidents did not constitute a substantial part of the novel, especially

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[7]Also cited by appellants and discussed by us in a moment.

in view of the fact that whereas the incidents in the novel were serious in nature, in the skit they were treated entirely as burlesque. This case raises the question of whether a burlesque can infringe a serious work. It is submitted that *it may be an infringement,* the material question for consideration being whether a 'substantial part' of the copyright work is or is not reproduced. [Citing the *Glyn* case.]" (Italics ours.)

In dealing with the extent to which bona fide criticism may go, Clarke says, *op. cit.,* page 83:

". . . the decision would depend, it is thought, upon the nature of the publication, *i. e.,* upon whether the object of the newspaper was genuinely to criticize the works, or whether under guise of criticism the real object was unfairly to derive profit from the reproductions as such. Whether a burlesque could constitute a fair dealing[8] for the purposes of criticism cannot be answered in the abstract, but must also, it is thought, depend upon similar principles applied to the particular case."[9]

Justice Younger's conclusion regarding burlesque was based upon two supposed rules of law, *neither of which is recognized in this country.* It necessarily follows that

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[8]The English term for what we call "fair use." It is expressly recognized in the English Copyright Act of 1911 [1 & 2 Geo. 5, c. 46, sec. 2(1)] whereas, significantly enough, burlesque or parody, notwithstanding its long history, is not.

[9]We cannot believe that it is seriously claimed in the case at bar that the appellants' burlesque was primarily or at all intended to be a dramatic criticism or review of "Gas Light" rather than a means by which they could derive profit for themselves. If review is the purpose, why is appellants' telecast of 1952 sought to be repeated this year—especially since "Gas Light" has not been shown in the interim?

his conclusion cannot be accepted here, whatever may be the situation in England.[10]

In the first place, the Justice commented upon the to him remarkable fact that "no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright . . ."[11] ([1916] 1 Ch. at 268.) He was apparently unaware of the American cases, decided several years before, in which burlesques had been "treated as an infringmenet of copyright." [*Green v. Luby, supra,* 177 Fed. 287 (1909); *Hill v. Whalen & Martell, supra,* 220 Fed. 359 (1914). See, also, *Bloom & Hamlin v. Nixon, supra,* 125 Fed. 977, 979 (1903), in which, although no infringement was found, it was clearly pointed out that burlesque could infringe.]

In the second place, and perhaps even more important, the two rules, which accounted in Justice Younger's mind for the supposed absence of such cases, are not law in this country, and certainly they are not in this circuit. These two rules were (1) the requirement, which he believed was imposed by some early English cases, of establishing as an essential element of infringement "that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the original work . . ."; and (2) the principle that "no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has

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[10]His premises were erroneous even in England, as we shall demonstrate shortly.

[11]Contrast the statement of the Ninth Circuit in *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d at 486-487, that neither counsel nor the Court were able to find a single case "to support the proposition that wholesale copying and publication of copyrighted material can *ever be fair use* . . ." (Italics ours.)

taken, and has subjected it to such a revision and alteration as to produce an original result . . ." The cases cited at Point II, A, B, *supra,* demonstrate that neither of these propositions is good law in this country.

Proof of that fact is *Leon v. Pacific T. & T. Co., supra,* 91 F. 2d 484, in this circuit. There, it will be recalled, the defendant had taken the plaintiff's copyrighted telephone directory (which was of the conventional type, listing subscribers alphabetically by name) and from it had compiled a directory listing telephone numbers in numerical order, from which the name and address of the subscriber could be obtained. Obviously, this inversion must have required a great deal of labor and certainly it produced an original result, at least in the sense of providing a directory which served an entirely different purpose and filled a quite different need from plaintiff's publication, which need the plaintiff had not sought to supply. Thus we see in this case the materials for the argument that there was no infringement of copyright because the object of the plaintiff's work had not been superseded nor its sales diminished and because an original result had been produced by the defendant's labors in transforming the copyright material into different form.

In reaching that result this Court relied heavily upon *Wetherby & Sons v. International House Agency* [1910], 2 Ch. 297, and *H. Blachloch & Co. v. C. Arthur Pearson, Ltd.* [1915], 2 Ch. 276. These cases are of additional interest here because they prove that the *Glyn* dictum was based upon an erroneous view of even the law of England. They clearly show, as does *Hanfstaengl v. Empire Palace* [1894], 3 Ch. 109, which appellants also cite, that in that country, just as in America, neither absence of injury or competition nor expenditure of effort by the defendant

is a defense to copyright infringement when substantial parts of the copyrighted work have been taken. [See, also, 7 Halsbury's Laws of England, *supra,* p. 567, sec. 893.]

Second: What has been said to this point applies with equal force to the remaining English cases cited by appellants, *i. e., Carlton v. Mortimer, supra,* McGillivray's Copyright Cases (1917-23) 194,[12] and *Hanfstaengl v. Empire Palace, supra,* [1894] 3 Ch. 109. A few additional comments directed particularly to those decisions may be appropriately made.

In *Carlton,* the defendant had for years performed an original comic acrobatic skit. After the publication of "Tarzan and the Apes" he inserted into that skit two incidents, similar to two which appeared in the Tarzan novel. In finding no infringement, the court, judging from McGillivray's report, took care to point out that the mere fact of use as burlesque would not necessarily or always defeat a charge of infringement but that in the specific case before it "burlesquing of two *trifling* incidents and the production of the performance under a title which was somewhat similar in sound to, but *different in fact* from, the title of the novel did not amount to an infringement . . ."[13] (Italics ours.) Manifestly, decision in that case was governed by the unsubstantiality

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[12]The report of this case is merely an abstract prepared by the editor of the case-book. It does not purport to be a verbatim transcript of the Court's opinion. In fact there does not seem to have been any formal opinion in, or official report of, the case, since it is not to be found in any of the English case reports.

[13]Copyright does not extend to protection of the title of a work. [*Arnstein v. Porter,* 2 Cir., 154 F. 2d 464, 474; *Warner Bros. Pictures, Inc. v. Majestic Pictures Corp.,* 2 Cir., 70 F. 2d 310, 311, and cases there cited.]

of the taking, not by any rule that burlesque as such is fair use.

The *Hanfstaengl* case has little, if anything, to do with our problem.[14] There, the plaintiff was the owner of German copyrights in some paintings. These paintings were more or less reproduced as live tableaux in a theatrical presentation. The tableaux, it was held in prior litigation, did *not* infringe Hanfstaengl's copyright. [*Hanfstaengl v. Empire Palace,* [1894] 2 Ch. 1.] In the subsequent case, the complaint was based on the publication, in defendant's newspapers, of rough sketches, not of the *original paintings,* but of the *tableaux.* The sketches had been made from a view of the tableaux on the stage and were apparently published either as criticism or as a news account of the theatrical production, although in this respect the report of the case is not clear.

The decision that there was no infringement was based on the proposition that these sketches were not copies of the original paintings but were, at best, merely a rough reproduction of their general outlines; in short, that the *copyrightable* elements of the paintings had not been copied.[15] Lord Justice Lindley's comment, which appellants italicize [App. Op. Br. 38], that the pictures were

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[14]It was decided twenty-two years before the *Glyn* case; and it was known to Justice Younger since he cited it in the *Glyn* opinion. Yet he said, it will be remembered, that he had found no case in the books dealing with burlesque as an infringement of copyright. Obviously, not even Justice Younger thought that the *Hanfstaengl* case dealt with the problem of burlesque. The case is important, however, as showing the error of his belief that diminution of the sale of the copyrighted works or some similar injury is necessary to a cause of action for infringement.

[15]From the standpoint of strict analysis all that can properly be said to have been decided is that a copy, of a copy which is not itself an infringement of the original, does not infringe, at least when its resemblance to the original is slight and remote.

"made for a very different purpose" must be read in the context of another comment which he made and which appellants do not quote:

> ". . . I do not think that the competition test is necessarily conclusive. I agree that if the Defendants had copied the Plaintiff's pictures they would have infringed his rights, even although the use made by the Defendants of such copies in no way compete with the sale of the Plaintiff's pictures . . ."[16]

Lord Justices Lopes and Davey (the other two judges participating in the *Hanfstaengl* case) agreed that the sketches complained of were merely rude reproductions of the general outlines of the copyrighted pictures and not, therefore, copies of their copyrightable elements. They reached this conclusion, as one of *fact;* not on any theory of law that parody was fair use. Actually, there is nothing in the opinions in that case to indicate that any question of parody or burlesque was raised, argued, considered or decided.

Third: Appellants' references to text-writers are no stronger than the decisions to which they have referred. For example, the authority upon which the quotation from 13 C. J. 1113, 1118 [App. Op. Br. 41] is based in that work is the *Glyn* case. Manifestly even that decision, forgetting its *obiter* and otherwise criticizable character, does not stand for any broad or unqualified rule that burlesque may not or cannot be an infringement.

The quotation from Weil, Copyright Law, p. 432 [App. Op. Br. 42] is in no better case. In support of the

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[16]That, of course, coincides exactly with the reasoning of this Court in *Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486-487, where it refused to find fair use even though the infringer's work served a different and non-competing purpose from that of the original.

quoted statement Weil cites *Hill v. Whalen & Martell, Inc., supra,* 220 Fed. 359, *Bloom & Hamlin v. Nixon, supra,* 125 Fed. 977, and *Story v. Holcombe, supra,* 23 Fed. Cas. 171. In the first of these cases, as we have seen, a dramatization of a cartoon strip was held to infringe copyright notwithstanding the plea that it "was a mere parody or burlesque of the original, and was so intended." In the *Bloom & Hamlin* case there was no infringement because of the unsubstantiality of the copyrighted material used; but, more importantly, the court expressly recognized the fact that parody or burlesque, if it went far enough, would infringe. *Story v. Holcombe* was not a parody or burlesque situation. It was an abridgment case, decided at a time when the Copyright Act permitted bona fide abridgments or condensations. Even so, the decision was that the copyright had been infringed because the copying had gone too far—had, in other words, crossed over into the field of substantiality. With decisions such as these as his authority Weil cannot properly be said to argue that "fair use" has no relation to substantiality of taking. Furthermore, in another portion of his text [*op. cit.,* p. 418, sec. 1097] he recognizes the correct rule and cites the appropriate decisions, *i.e., Green v. Minzenheimer, supra,* 177 Fed. 286, *Green v. Luby, supra,* 177 Fed. 287, and *Bloom & Hamlin v. Nixon, supra,* 125 Fed. 977.

De Wolf's dogmatic statement that parody is not an infringement [App. Op. Br. 42] is not supported by the citation on his part of any cases. It certainly cannot be given preference over the judicial pronouncements on the subject to which we have referred, which have held that specific parodies did infringe. [Cases cited, Point II, A, *supra.*]

Spring, *Risks and Rights* [App. Op. Br. 42] is not a legal treatise but a popularization of the subject intended for the lay public. As such it suffers from over-simplification of problems and a generality of statement not uncommon in works of that class. In any event, the author recognizes that the proper point of legal attack on parody or burlesque is in the *extent* of the use which is made of copyrighted material. Lindey's "Plagiarism and Originality" [App. Op. Br. 42] is also a popularization for lay consumption. He too, however, recognizes that parody can infringe and that it does infringe when "it is a transparent cover-up for stealing." [Lindey, *op. cit.*, p. 43.]

The quotation from Judge Yankwich's article in 33 Canadian Bar Review 1130 [App. Op. Br. 42-43] is an argument for an *extension* of "the boundaries of 'fair use'" so as to include parody and burlesque. It thus necessarily recognizes that at present the doctrine of fair use is not broad enough to save all parody or burlesque merely because it is that form of expression. The argument is based on "the primary purpose of promoting the progress of science and arts. . . ." Such an argument would apply with equal if not stronger force in favor of permitting any serious or scholarly writer to make similar inroads upon the protection intended to be given by copyright. Yet admittedly the law gives no such privilege to the serious novelist or dramatist or to the scholarly historian, essayist or treatise-writer. He may not appropriate substantial parts of the copyrighted work. Here, again, we may ask: Why such a preferred position for the parodist and only the parodist?

Furthermore, if the three criteria of fair use expounded by Judge Yankwich are applied to our facts the conclusion reached below is confirmed. There can be no doubt that "the quantity and importance of the portions taken" were

substantial as found below; and that "their relation to the work of which they are a part" was basic, intimate and essential. Without those parts neither the infringed nor the infringing work here would be anything but a jumble of meaningless words or "gags." [Point I, First, Second, *supra.*] The last of Judge Yankwich's criteria—"the result of their use upon the demand for copyrighted material" is the very one which this Court, in a fair use case, has described as not being necessary to sustain a charge of infringement. " 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.' " [*Leon v. Pacific Tel. & Tel. Co., supra,* 91 F. 2d at 486-487, quoting *Fox Film Corp. v. Doyal, supra,* 286 U. S. at 127. See, also, the cases cited, Point I, *Third,* and Point II, B, *First, Second, supra.*] Competition, *i.e.,* the reduction of demand for the original, will prevent a use from being held fair. [See, cases first cited, Point II, B, *First, supra.*] Its absence, however, does not transform a substantial taking into a fair or noninfringing use.

Even if absence of competition were relevant, it is not absent at bar. Loew's had and has the right to reproduce its copyrighted material in any form. It could reissue "Gas Light". [R. 56.] So, too, it could adapt the work to a comic or parodied version. It is directly contrary to the plain import of the Copyright Act to say that another can anticipate a reissue or such an adaptation and to that extent satisfy the public demand.[17] More-

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[17]Appellant Benny's programs are generally heard and seen by 25,000,000 or more people. [R. 72-73.] It has been produced as a motion picture. [R. 64, 67-68] It could, therefore, be shown in theaters in direct competition with Loew's photoplay.

over, as we have already noted, millions of people will stay at home to watch a Jack Benny television program. Necessarily, many of those people might otherwise have gone to a movie theater. What the appellants are seeking—and it is significant that CBS, a large, national television network is one of them—is the right to compete with Loew's for the attention and patronage of the entertainment-minded public by appropriating and using the material acquired and created by Loew's at great cost and effort.[18] What, we may ask, is "fair" about that? [See, *Hill v. Whalen & Martell, supra,* 220 Fed. at 360, giving emphasis to the fact that those who saw the alleged parody would be less desirous of seeing the original.[19]]

The law school student's essay in the ASCAP Symposium [Cohen, Fair Use in the Law of Copyright, 6 Copyright Law Symposium, 54] is apparently cited [App. Op. Br. 42] for its statement that "parody and mimicry are forms of criticism or comment. . . ." That may be true, but it does not mean that *all* parody or mimicry is or is intended to be criticism or, if it is, that it is necessarily *fair* criticism or comment. If the critic, in *good faith,* reviews and comments upon a literary or dramatic work he is entitled to some reasonable degree of quotation. But if, in the guise of criticism, he is really appropriating another's work as the means of providing

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[18]Contrast the more than $275,000.00 expended by Loew's for its dramatic material, with the $5,000.00 paid appellants' "writers" in connection with the television play. [R. 53, 70.] How much more would appellants have had to expend if they had not had ready to hand the appellee's copyrighted photoplay?

[19]Word of mouth advertising is of extreme importance in the entertainment world. Note, in that connection, the phenomenal success of the television program conducted by Dr. Baxter, appellants' expert witness, largely helped by the word of mouth advertising of his viewers. [R. 156-157.]

the framework and substance of his own drama or play, he is infringing. [*Cf., Folsom v. Marsh, supra,* 9 Fed. Cas. at 344-345; *Webb v. Powers, supra,* 29 Fed. Cas. at 516-517; *Bloom & Hamlin v. Nixon, supra,* 125 Fed. at 978; *Hill v. Whalen & Martell, supra,* 220 Fed. at 360.]

It cannot be seriously argued on this record that Jack Benny, a comedian, CBS, a television network and competitor of Loew's, and the *American Tobacco Co.,* a cigarette manufacturer, were primarily or even incidentally engaging in dramatic criticism—particularly criticism of a motion picture which had been released nearly *ten years* before and which, at the time of the alleged critique, was not and for several years had not been in release in this country. [R. 54, 56.] Rather, they were engaged, respectively, in practicing the acting or comedian's profession, selling advertising time, and advertising tobacco; and they produced their television play, as was found below, for purposes of profit. [R. 82-84.] For such mundane purposes, they should not be free to take the property of another.

If, on the theory of criticism or comment, the mere fact that the copy pokes fun at the original immunizes the copyist from a charge of infringement regardless of the medium in which the critcism appears, no original work is safe. Any such use of the copy, even though in the same medium as the original, would then be defensible as being merely "criticism" although it was in fact a flagrant steal. Any transformation of a drama into a comedy could thus be justified as being "criticism." But criticism to be a defense must be primarily, if not even solely, criticism *as such.* The critical flavor cannot be merely an incident—probably an unintended incident at that—of the primary purpose of getting material for one's

own dramatic or literary effort designed for public performance or sale in the same general medium as the original.

In this connection it is worth pointing out that, insofar as the material lifted from appellees is concerned, its humorous qualities in appellants' use of it springs solely from the *manner in which it is performed* and its juxtaposition to other material of a slapstick nature. The comedy does not inhere in the material itself, as a reading of appellants' scripts [Exs. 9, 11. Appendices A, B, *infra*] will show. So, if here the lifted parts had been performed in a serious rather than a farcical vein, the infringement would be apparent to all. If the manner of performance, rather than the nature and substance of what has been taken, is to govern infringement—and that is what appellants' contention must come down to—the *reductio ad absurdum* is readily perceivable. One could then pirate another's *entire* copyrighted work, perform it word for word as written, but escape a charge of infringement by burlesquing its rendition, *i.e.,* by playing it with comically exaggerated gestures, intonations and stage business.[20] That obviously is not and cannot be the law. There is no difference in principle when the comic element is introduced by adapting the pirated material into humorous form rather than by the manner of performing it. In either case it is the *same material* which is taken and used for the ulterior purposes of the taker.

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[20]Old-fashioned and seriously intended dramas are now frequently made into hilarious comedies by just such a burlesque *performance* of the original script. In the case of such a script still protected by copyright, would the burlesque or satirical manner of performing it defeat a charge of infringment?

III.

Custom, Even if Established Which It Was Not, Cannot Change or Limit the Plain Meaning of the Copyright Act.

The argument that "long-established custom" can be looked at to determine appellees' rights [App. Op. Br. 47-51] is largely, if not entirely, irrelevant. If the taking of substantial copyrighted material by way of parody is not a violation of the rights conferred by the Copyright Act, there is no need to resort to custom. If it is, custom cannot change or alter the statutory grant. [*United States v. Pine River Logging etc. Co.,* 8 Cir., 89 Fed. 907, 915-916; *United States v. Dodson,* S. D. Cal., 268 Fed. 397, 406-407.]

The two cases just cited also indicate that if statutory meaning is to be affected by custom, it must at least be shown that "it [the alleged custom] was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed, as to leave no room for doubt that the usage was known to the lawmaker, and that the statute which it serves to modify was enacted with reference thereto. . . ." [*United States v. Pine River Logging etc. Co., supra,* 89 Fed. at 915-916.] The evidence of custom fails by a long distance to come up to that standard.

First: The evidence shows no more than that burlesques and parodies have been written since classical Greek times. [R. 115-116.] It also shows that true parody or burlesque "does not parallel [the original] in the sense that it just recreates the thing in a new tone, but it takes off from it . . . But in no sense parallels the original." [R. 156.] Thus, whatever may be said for the age or the pervasiveness of the custom, it cannot

be said to be so far reaching as to give to the Copyright Act a meaning which would classify as non-infringing a reproduction which does parallel the original.

Appellants' expert witness, it is true, mentioned a number of parodies and burlesques. It is apparent from his description of them, however, that most of them were parodies of style, ideas and philosophies, not copies or reproductions of the detailed manner of expression, incidents and sequence of events of the original. [See, *e.g.*, R. 116, 118, 120-121, 129, 169-170.] They took no more from the original than anyone may freely take from copyrighted works even today. Furthermore, keeping in mind the rudimentary and narrow rights conferred by earlier copyright statutes it is very likely—at least the contrary is not shown [R. 172-183]—that until modern times an author whose work was copied by way of parody had no redress in law.[21] In those circumstances existence of a practice of heavy appropriations for purpose of parody would be meaningless under a statute, such as ours, designed to reserve to the copyright owner "any lawful use of his property, whereby he may get a profit out of it . . ." [*King Features Syndicate v. Fleischer, supra,* 299 Fed. at 535-536.]

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[21]The first English copyright statute—the Statute of 8 Anne, c. 19—gave authors only the right to print, publish and republish their works. The same was true of the first American statute. [1 Stat. 124.] Even the right to dramatize a published work was not granted the author in either country until a much later date. [*Ferris v. Frohman,* 223 U. S. 424, 432-433.]

Be that as it may, the practice did not go unchallenged. It was not universally acquiesced in. Some authors objected. [R. 159-162.] Whether authors generally gave or did not give permission to burlesque their works we do not know.[22] [R. 174.] And, as we do know, in this country copyright proprietors have objected to the use of their works in burlesque and have been upheld by the courts. [Cases cited, Point II, A, *supra.*]

In short, then, it cannot be said that there has been a universally accepted and acquiesced in practice of appropriating as much as one desires for purposes of parody. Without a practice of that breadth and universality firmly established when the present Copyright Act was enacted in 1909 there is no basis at all for the contention that the statutory grant of an exclusive right to "copy and vend the copyrighted work . . . and to play or perform it in public for profit, and to exhibit, represent, produce or reproduce it in any manner or by any method whatsoever . . ." [17 U. S. Code, sec. 1(a)(c)] is less broad than its language plainly shows it to be.

Second: The fact that appellant Benny has frequently presented parodies on his radio and television programs means nothing. One man's practice does not make a universal custom. Even if it did, Benny's practice certainly came much later than the enactment of the Copyright Act of 1909 under which appellees claim.

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[22]So far as Benny and Loew's are concerned, such permission was requested by the former from time to time. [R. 58-59.]

Furthermore, so far as *Loew's* is concerned, the evidence is clear that Benny at various times requested its permission to parody some of its pictures, which permission was granted on condition that Loew's have the right of approving his script. [R. 57-59.] This fact alone justified the District Court in concluding that there was no universal custom of free and unrestricted parody; and that Benny did not think there was.

In other instances, Benny's parodies were of pictures the basic literary material of which was in the public domain. [R. 59.] Benny was, of course, free to use this material in parody. In the very nature of things it was freely available to all.

Actually, there is no showing whatever that any of Benny's parodies, other than the one here involved, ever exceeded permissible limits of appropriation, *i.e.,* that they ever went beyond use of the uncopyrightable elements of the photoplays which he parodied. In this connection, it may be said that Judge Carter's decision in what appellants refer to as the "Eternity" case [App. Op. Br. 31-32] was based on this ground. The parody there, he found, did not take substantial copyrightable material from the plaintiff's photoplay. He expresly re-affirmed his earlier view that burlesque was not a defense *per se.* [*Columbia Pictures Corp. v. National Broadcasting Co.,* S. D. Cal., 137 F. Supp. 348, 350-351, 352-353.] The distinction between that case and the one at bar is purely factual, and that difference accounts for the difference in results. So far as rules of law are concerned the two cases are in complete harmony.

Conclusion.

The judgment appealed from should be affirmed. It rests solidly on the foundation of a finding that substantial copyrighted material was taken. That taking was not fair use because of the substantiality of the material appropriated, the existing competitive relationship of the takers vis-a-vis the copyright owner, and the essential unfairness of permitting one to take the property of another for purposes of personal profit. The taking encroached upon the exclusive rights conferred by appellee's copyright and, therefore, required a conclusion of infringement.

Respectfully submitted,

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APPENDIX "A."

Defendants' Television Play (2d Ed.) With Material Taken From Plaintiff's Photoplay Deleted.

DON

. . . Yes, ladies and gentlemen, tonight the Lucky Strike Players will bring you a great psychological drama. . . . "Autolight" . . . starring Barbara Stanwyck and Jack Benny. . . .

(MUSIC.)

(AS CURTAIN OPENS, WE DISCOVER THE MAID DUSTING SOME SMALL ARTICLES ON THE MANTLEPIECE.)

* * * * * * * * *

(THE 1ST MAID TURNS AND SEES THE MAID ARRANGING THE TRAY ON THE TABLE.)

(MUSIC OUT.)

* * * * * * * * *

MAID

The master said she ordered this for dinner.

1ST MAID

What is it?

MAID

Marinated Salami.

* * * * * * * * *

1ST MAID

(LOOKING OFF.)

Sssshh . . . here she comes now. If you need me, I'll be in the pantry.

(1ST MAID EXITS AND THE MAID BUSIES HERSELF WITH THE TRAY.)

(BARBARA STANWYCK ENTERS AS MRS. MANNINGHAM.)

(APPLAUSE.)

BARBARA

Elizabeth . . . Elizabeth, I've changed my mind. I don't think I'll eat anything.

MAID

Why, Madame, don't you feel well?

* * * * * * * * *

MAID

Madame, perhaps if you ate something you would feel better.

BARBARA

Yes, yes, perhaps you're right.

(SHE GOES OVER AND SITS AT TABLE.)

MAID

I know you'll enjoy your supper. It's exactly what your husband said you ordered.

BARBARA

(POINTING TO A DISH ON THE TRAY.)

What's that?

MAID

Marinated Salami.

BARBARA

Marinated Salami?

MAID

Yes, ma'am.

(PICKING UP THE TEA POT.)

Shall I pour the sour cream?

BARBARA

(JUMPING UP.)

No, no, don't pour anything. . . . Where's my husband? Why isn't he here when I need him?

SOUND (OFF) DOOR SLAMS.

Madame, I think the master just came in.

(Music.)

Barbara

Oh, good, good. Elizabeth, you may go.

(Maid exits . . . Barbara goes to couch, stands with back to audience . . . Jack enters, dressed in the period of the day, and stands with an overly dignified and lofty air.)

Barbara

Oh Charles, Charles, my husband . . . I'm so glad you're home.

(Jack calmly takes off his hat and places it and coat on rack, goes over to fireplace.)

* * * * * * * * *

Barbara

I had to come out, Charles. It was those headaches again . . . those awful headaches. I've been confined to my room all day . . . breakfast in bed, lunch in bed . . . I couldn't have dinner in bed, it was full of dirty dishes.

(She throws herself on the couch.)

* * * * * * * * *

(Jack turns, pulls the bell cord, and loose plaster falls from the ceiling.)

* * * * * * * * *

Jack

(Turning to Rochester.)

You may go, Jeeves.

Rochester

Thank you, sir. . . . May I have tomorrow off?

JACK

Tomorrow off? Why?

ROCHESTER

The cricket matches, you know.

JACK

Oh yes, yes.

ROCHESTER

Thanks, boss.

JACK

What?

ROCHESTER

Righto, Governor.

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

* * * * * * * * *

BARBARA

Wait, Charles, wait . . . Before you go, kiss me.

JACK

Very well.

(JACK GIVES BARBARA A BIG KISS.)

JACK

How was that, Bella?

BARBARA

One dimension.

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

* * * * * * * * *

(BARBARA GOES OVER TO UMBRELLA STAND, TAKES OUT AN UMBRELLA, OPENS IT UP, STEPS BACK TO THE BELL CORD, PULLS IT, AND IS DELUGED BY A DOWNPOUR OF PLASTER.)

BARBARA

Why does he leave me like this? Why? Why?

* * * * * * * * *

(We see the dark figure of a man enter the room.)

Barbara

Oh, Charles.

(She throws her arms around him and kisses him fervently.)

Barbara

Don't ever leave me again, Charles.

(Kisses him again.)

Oh Charles, Charles, let me hold you closer.

(Kisses him again.)

Charles . . . Wait a minute . . . who are you?

Bob

If I told you I'm anybody else but Charles, I'd be crazy.

* * * * * * * * *

Barbara

Inspector, how do you know so much about this house?

Bob

I built it.

Barbara

What?

Bob

If your husband ever asks you where Little Rock is, say Idaho.

Barbara

I don't know what you're talking about . . . Anyway, Inspector, what are you going to do to my husband?

* * * * * * * * *

(Bob goes to a closet at the other end of the wall, opens it, goes in, and closes the door after him.)

BARBARA

(TO HERSELF.)

He may have to be in there for a long time. I better give him something to eat.

(SHE PICKS UP PLATE OFF THE TABLE, STEPS OVER TO THE CLOSET DOOR AND KNOCKS.)

Inspector . . . Inspector . . .

(THE OTHER CLOSET DOOR OPENS AND BOB STICKS HIS HEAD OUT.)

BOB

Did you call me?

BARBARA

Yes, I—

(TURNING.)

Wait a minute, you were in this closet.

(SHE GOES OVER TO BOB'S CLOSET.)

* * * * * * * * *

BARBARA

Thank goodness. Here, in case you get hungry.

BOB

(POINTING TO TRAY.)

What is that?

BARBARA

Marinated Salami.

BOB

Oh, jolly good!

(SOUND: OFF STAGE WE HEAR THE DOOR OPENING AND CLOSING.)

BARBARA

My husband—he's coming back!

(SHE SLAMS THE CLOSET DOOR AND GOES TO SIT DOWN.)

(JACK ENTERS.)

JACK

(POINTING TO FLOOR.)

Bella, how can you be so careless as to leave this napkin on the floor?

BARBARA

I'll put it in the closet.

JACK

No, I'll do it. I'll put it in the closet.

(HE PICKS UP NAPKIN AND STARTS FOR THE CLOSET WHERE WE LAST SAW BOB AND IS ABOUT TO OPEN THE DOOR.)

BARBARA

No, no, Charles, not that closet.

JACK

Huh?

BARBARA

(POINTING TO OTHER CLOSET.)

That is the linen closet.

JACK

Very well. Oh, incidentally, Bella, I ran into Dr. Pepper today and while we were having a coke, he said—

(JACK GOES TO THE OTHER CLOSET, BOB OPENS DOOR, UNCEREMONIOUSLY SNATCHES THE NAPKIN OUT OF JACK'S HAND AND SLAMS THE DOOR SHUT. JACK STANDS LOOKING AT THE DOOR SLIGHTLY BEWILDERED.)

BARBARA

Charles, did you put the napkin in the closet?

JACK

I didn't have to, the closet reached out and grabbed it.

* * * * * * * * *

(JACK REACHES FOR THE BELL CORD AND AS HE IS ABOUT TO PULL IT, HE SUDDENLY STOPS . . . STEPS OVER TO THE ARCHWAY AND CALLS—)

Jeeves!

BARBARA

Coward.

JACK

Jeeves, pack madame's bag! But before you do, bring me a brandy.

ROCHESTER

(OFF)

Yes, sir!

* * * * * * * * *

(THE BUTLER ENTERS WALKING ON HIS HANDS AND BALANCING A TRAY ON HIS FEET . . . JACK CALMLY REACHES FOR THE BRANDY GLASS ON THE TRAY. HE PICKS UP THE GLASS, GULPS DOWN THE DRINK, REPLACES IT ON THE TRAY, AND THE BUTLER EXITS ON HIS HANDS.)

* * * * * * * * *

BARBARA

Fingerprints?

BOB

Yes.

BARBARA

The ones on the rug belong to the butler.

BOB

(To JACK.)

Come along now.

* * * * * * * * *

(SHE GOES TO THE BELL ROPE AND PULLS IT . . . BOB COMES IN AS PLASTER AND BRICKS FALL FROM THE CEILING ALL OVER EVERYTHING.)

(MUSIC AND APPLAUSE.)

APPENDIX "B."

Defendants' Television Play (2d Ed.) With Material Supplied by Them Deleted.

. . . we're going to do the play I was talking about. Barbara Stanwyck and I will present a satire of M.G.M.'s great classic, "Gaslight." . . .

* * * * * * * * *

DON

The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871.

(A MAID ENTERS WITH A TRAY AND PLACES IT ON THE TABLE.)

DON

Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane.

* * * * * * * * *

1ST MAID

I thought the master wanted Mrs. Manningham to have supper in her room.

MAID

(SLIGHT ENGLISH ACCENT.)

He did, but she insists on eating in here . . . and if you ask me, I think she's off her trolley.

* * * * * * * * *

1ST MAID

She's an odd one, all right.

MAID

The master says if she gets any worse, he's going to send her away to a—

* * * * * * * * *

BARBARA

It is these headaches, the frightful headaches . . . and my husband tells me I keep doing things I don't even remember. I can't sleep at night . . .

* * * * * * * * *

I'm going mad, I tell you . . . These headaches, these awful headaches, I don't even remember ordering anything like that . . .

* * * * * * * * *

(JACK ENTERS, DRESSED IN THE PERIOD OF THE DAY, AND STANDS WITH AN OVERLY DIGNIFIED AND LOFTY AIR.)

* * * * * * * * *

BARBARA

The hours that you're away drag on and on. I can't live without you by my side. I need your sympathy . . . your help . . . your tender understanding.

(JACK, WITH MEASURED NONCHALANCE, REMOVES HIS GLOVES, FINGER BY FINGER.)

BARBARA

Oh, my darling . . . my beloved . . . only you can guide me through the darkness of my confusion. Only you can make me smile again, laugh again, live again . . . Charles . . . Charles . . . speak to me . . . speak to me!

JACK

(WITH ARROGANT COLDNESS.)

What are you doing out of your room?

(TURNING.)

Answer me, Bella . . . What are you doing out of your room?

BARBARA

I had to come out, Charles. It was those headaches again . . . Those awful headaches . . . it was driving me mad . . .

* * * * * * * * *

(SHE THROWS HERSELF ON THE COUCH.)

JACK

Now, now, Bella, control yourself. Now now, you're getting hysterical . . . What you need is a sedative. I'll ring for the maid.

* * * * * * * * *

JACK

* * * * * * * * *

Bella, while you're waiting for a sedative, why don't you just relax?

BARBARA

Yes, Charles.

JACK

Now just close your eyes and forget everything.

BARBARA

Yes, Charles.

(JACK RUSHES OVER AND TURNS A PICTURE OF WASHINGTON CROSSING THE DELAWARE UPSIDE DOWN . . . THEN GOES BACK TO LEFT OF BARBARA.)

JACK

Do you feel better now, Bella?

BARBARA

(OPENING HER EYES.)

Yes, Charles, yes.

JACK

(LOOKING AT PICTURE.)

I knew if you just sat down for a minute and relaxed, you'd feel so much . . . so much . . .

BARBARA

Charles . . . what are you staring at?

JACK

That picture . . . that picture on the wall. Why did you turn it upside down?

BARBARA

Picture . . . upside . . .

(TURNS, LOOKS AT PICTURE . . . THEN BACK TO JACK.)

But I didn't . . . I didn't turn that picture upside down. It must have been someone else.

(BURIES FACE IN HANDS, CRYING.)

Oh, Charles, what's happening to me . . . what's happening to me?

* * * * * * * * *

JACK

Bella . . . the other picture is upside down, too. Look!

BARBARA

No! No!

JACK

Why do you keep doing these things?

BARBARA

But I didn't! I didn't.

JACK

(BENDING OVER BARBARA.)

Bella, Bella, your mind is failing. Why don't you let me send you away? You turned the picture upside down and don't even remember.

BARBARA

(GETTING UP.)

But I didn't do it, Charles. . . . It must have been someone else.

(GOES TO FIREPLACE.)

JACK

Someone else . . . always someone else. Bella, are you suggesting that one of the maids or the butler did it?

BARBARA

(GROPING.)

Yes, yes. . . . That's it, the butler, he must have done it.

JACK

Very well, I'll find out.

(JACK STARTS FOR THE BELL CORD . . . BARBARA TAKES A STEP TOWARD JACK.)

BARBARA

Charles, don't humiliate me in front of the servants, please.

(SITS DOWN ON COUCH.)

JACK

It's the only way, Bella. I must ring for the butler.

BARBARA

Oh, Charles, if the butler didn't turn the pictures upside down, perhaps I did it, but I don't remember.

* * * * * * * * *

JACK

Hmm . . . what's keeping that butler?

(CALLING.)

Jeeves . . . Jeeves.

(ROCHESTER ENTERS.)

ROCHESTER

Cheerio. Did you ring, sir?

JACK

Yes, Jeeves. . . . The pictures on the wall are upside down if you noticed it.

(POINTING TO PICTURES.)

ROCHESTER

(LOOKING AT PICTURES.)

Well, by Jove, if they ain't!

JACK

Did you do it?

ROCHESTER

Who, me?

BARBARA

Yes, Jeeves, maybe you turned them upside down when you were dusting.

* * * * * * * * *

ROCHESTER

Oh, your lordship, come now!

JACK

Then I can assume that you did not turn the pictures upside down.

* * * * * * * * *

(TURNING TO BARBARA.)

Did you hear that, Bella? It was you who did it.

BARBARA

But, Charles, I don't remember, I don't remember.

JACK

Don't remember . . . don't remember . . . You've been doing everything backwards . . .

* * * * * * * * *

Bella, you're all mixed up. . . . Why don't you admit it . . .? Why don't you let me take care of you? Why don't you let me take care of you?

* * * * * * * * *

Bella, your mind is failing and you might as well admit it.

(TURNING TO ROCHESTER.)

You may go, Jeeves.

* * * * * * * * *

(ROCHESTER EXITS . . . BARBARA TURNS TOWARD JACK.)

JACK

Bella, I'm sure that now you realize you are mentally ill.

(JACK TURNS AND PICKS UP HIS HAT, CAPE, CANE, ETC.)

BARBARA

(GOING TO STAIRWAY.)

Charles . . . Charles . . . where are you going?

JACK

I have an appointment.

BARBARA

Every night . . . every night you leave me alone . . .

* * * * * * * * *

(JACK LOOKS AT AUDIENCE, MAD, AND WALKS OFF.)

BARBARA

(STARTS AFTER JACK, STOPS, TURNS BACK.)

Every night he leaves me alone. I can't stand it any longer.

These headaches, these awful headaches. I must have someone to talk to.

(CALLS.)

Elizabeth . . . Elizabeth . . . Where is that maid?

(THE LIGHTS FLICKER AND GO DIM.)

BARBARA

The lights . . . the gas lights are going dim again . . . the same as they did last night and the night before. Every time he leaves me, they go dim. Oh, why does he do this to me? If only he knew how much I love him, he'd stay here and comfort me through my hours of—

(SOUND: DOOR OPEN AND CLOSE OFF SCENE.)

BARBARA

The front door. . . . He's come back. He's come back!

(WE SEE THE DARK FIGURE OF A MAN ENTER THE ROOM.)

* * * * * * * * *

BARBARA

(STEPPING BACK.)

What do you want?

BOB

I want to see you. I'm an inspector from Scotland Yard. I've come to talk to you about your husband.

BARBARA

Oh, my poor Charles . . . is he in danger?

BOB

No, but you are.

BARBARA

Me?

BOB

Yes. . . . You see, your husband is a notorious jewel thief. Fifteen years ago he murdered a woman who lived in this mansion. Then he married you so that under the guise of an English gentleman he could buy the place and search for her hidden jewels.

BARBARA

No, Inspector!

* * * * * * * * *

BOB

Now as I was saying . . . Your husband is trying to drive you out of your mind so that he can send you away and then he can continue his search in the attic.

BARBARA

(GETTING UP.)

That's why the lights go dim down here. He turns the gas on in the attic.

BOB

Yes . . . then he has a secret door through which he can return to the living room and act as though nothing has happened.

* * * * * * * * *

(THE LIGHTS NOW FLICKER AND GET BRIGHT AGAIN.)

(MUSIC.)

BARBARA

The lights . . . the gas lights are up again. That means my husband is coming back. . . . Quick, quick . . . get in the closet.

(BARBARA GOES TO TABLE.)

(BOB GOES TO A CLOSET AT THE OTHER END OF THE WALL, OPENS IT, GOES IN, AND CLOSES THE DOOR AFTER HIM.)

* * * * * * * * *

JACK

Well, Bella, are you feeling better now?

BARBARA

Yes, Charles, my headache is all gone.

JACK

Oh.

* * * * * * * * *

BARBARA

(WITH BACK TO JACK.)

Charles, you're talking crazy.

JACK

No, no, Bella, you're the one who's crazy. You keep going around the house turning things upside down . . . and then you say you don't remember.

(TURNS BARBARA AROUND.)

Admit it yourself, Bella, you're losing your mind. Let me send you away. I'll have the butler pack your bag.

* * * * * * * * *

ROCHESTER

(OFF)

Yes, sir!

JACK

(HE GOES BACK TO BARBARA.)

I must send you away, Bella. This evening you turned the pictures upside down. Yesterday you turned the chair upside down, the desk upside down, the table upside down, you kept going all around the house turning everything upside down.

* * * * * * * * *

JACK

(WITH VILLAINOUS EXPECTANCY.)

Bella . . . Bella . . . didn't you notice anything different about the butler?

BARBARA

Yes, Charles, and I found out something different about you, too.

JACK

What?

BARBARA

Your game is up . . . Your scheme didn't work . . . I know who you are . . . and what you are . . . and I know what you've been trying to do to me.

JACK

Oh, you do, eh? . . . then my dear Bella, the time is over for subtleties.

(JACK MAKES A LUNGE FOR BARBARA, FASTENS HIS FINGERS ABOUT HER THROAT AND BENDS HER OVER A CHAIR. THE CLOSET DOOR OPENS AND BOB STEPS INTO THE ROOM . . .)

BARBARA

Inspector, help me . . . please!

BOB

What? . . . Oh, yes, yes.

(HE TOSSES THE PLATE ASIDE AND QUICKLY SUBDUES JACK.)

Unhand that woman. Mr. Manningham, I place you under arrest. Lady Bella, I shall take him to the police station and then I'll come back and search the house for fingerprints.

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BARBARA

(GETTING UP.)

Wait, before you take him away, I'd like to talk to my husband alone.

(TURNS BACK TO JACK.)

BOB

Alone. Then I better tie him to this chair.

(BOB SETS JACK IN THE CHAIR AND TIES HIS HANDS BEHIND HIM WITH THE NAPKIN.)

BOB

(To BARBARA.)

I'll be in the kitchen, if you need me.

(BOB EXITS.)

JACK

That was very clever of you, Bella, the way he fell for it.

BARBARA

What?

JACK

I'm Charles, your husband, and you love me . . . do you hear, you love me. Go, Bella, go over to that table. There's a knife there. Get it and cut me loose.

BARBARA

(CRAZILY.)

Yes, yes, the knife . . . the knife.

(SHE GOES TO THE DESK, GETS THE KNIFE, STEPS BACK TO JACK, AND STANDS LOOKING AT HIM DELIBERATING.)

JACK

That's it, Bella . . . Bella, why are you standing there? . . . Cut me loose . . . Cut me loose . . . Bella, aren't you going to cut me loose?

BARBARA

(VERY DRAMATIC AND MENACING.)

Yes, Charles, I'm going to cut you *very* loose.

JACK

Bella! Bella . . . Bella . . . what are you going to do? . . . I'm your husband. I'm Charles.

BARBARA

(KNEELING BY JACK.)

Yes, Charles, you're my husband . . . and you tried to make me believe that I was crazy. . . . Well, maybe I am.

(PUTTING THE KNIFE TO HIS THROAT.)

Maybe I am . . . But it was you who drove me to it . . . It was you who turned the pictures upside down . . . It was you who turned the lamp upside down and almost convinced me that I did it . . . Then you turned the table upside down . . . the desk upside down . . .

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JACK

Bella!

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JACK

Bella, don't kill me . . . don't kill me!

BARBARA

No, I won't kill you. That's too good for you. I'm going to let them take you away . . . INSPECTOR,

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. . . INSPECTOR . . .

(MUSIC AND APPLAUSE.)